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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-432

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

BRIAN F. WEBER, KAISER, ALUMINUM & CHEMICAL CORPORATION, AND UNITED STATES OF AMERICA,
Respondents.

No. 78-435

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

v.

BRIAN F. WEBER,
Respondent.

No. 78-436

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,

v.

BRIAN F. WEBER, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

The Equal Employment Advisory Council ("EEAC"), with the consent of all parties, respectfully submits this brief as *Amicus Curiae.*

INTEREST OF THE *AMICUS CURIAE*

This case presents questions of great importance to employers throughout the United States, including EEAC's members, who are subject to the provisions of Title VII of the 1964 Civil Rights Act (42 U.S.C. § 2000e *et seq.*) (Title VII) and Presidential Executive Order 11246 (30 Fed. Reg. 12319 (1965), as amended by 32 Fed. Reg. 14302 (1967), and 43 Fed. Reg. 46501 (1978), (E.O. 11246).[1] At issue is whether these regulatory schemes permit an employer and union to enter voluntarily into a racially-based affirmative action program designed to remedy underrepresentation of minority employees in certain segments of the employer's workforce when there has been no determination of past employment discrimination by the particular employer.

Most of EEAC's member representatives are charged with corporate responsibility for voluntary compliance with the federal civil rights laws.[2] As

[1] There are approximately 325,000 employer contractors subject to the requirements of E.O. 11246. They employ about 30 million persons. *See Major Federal Equal Employment Opportunity Programs for the Private Sector Should be Consolidated,* A Report by the Comptroller General of the United States (HRD-78-72), June 9, 1978, p. 3.

[2] EEAC is a nonprofit association organized to promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscrim-

equal employment officers of employers which, for the most part, are federal contractors, they must attempt to determine not only their federal nondiscrimination and affirmative action obligations, but also the potential liability which those requirements might create to nonminority employees and applicants who may assert that these affirmative action efforts are unfair and discriminatory.

The decision of the Fifth Circuit majority below, holding that the program adopted by Kaiser and the Steelworkers violated Title VII, illustrates and intensifies the dilemma created by these competing interests. It places employers in the position of facing potential liability to nonminority or male employees because of good faith attempts to comply with the

inatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations whose employer-members have a common interest in the foregoing purpose. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity.

Because of its interest in issues pertaining to equal employment, EEAC has filed briefs as *Amicus Curiae* in a number of other recent cases raising important equal employment issues. See, *e.g., The Regents of the University of California* v. *Allan Bakke,* 98 Sup. Ct. 2733, 48 U.S.L.W. 4896 (1978); *County of Los Angeles* v. *Van Davis* (No. 77-1553), *petition for cert. granted; Furnco Construction Corporation* v. *Waters,* 46 U.S.L.W. 4966 (1978); *Int'l Brotherhood of Teamsters* v. *United States,* 431 U.S. 324 (1977); *East Texas Motor Freight Systems, Inc.* v. *Rodriguez,* 431 U.S. 395 (1977); *United Air Lines, Inc.* v. *Evans,* 431 U.S. 553 (1977); *Gardner* v. *Westinghouse Broadcasting Company,* 434 U.S. 984 (1978); and *Trans World Airlines* v. *Hardison,* 432 U.S. 63 (1977).

requirements found in statutes, executive orders and other government directives intended to prevent discrimination, and also to comply with regulations under E.O. 11246 and increase the utilization of minorities and women.

Since EEAC's organization, our members have engaged in continuing efforts to ascertain the permissible limits of employer affirmative action. There is a strong commitment among EEAC members to affirmative outreach and recruiting practices designed to increase the employment of minorities and women.[3] Employers differ, however, in their views as to the extent to which they may voluntarily implement numerically based programs to increase the hiring, training or promotion of minorities when the employer has not been found to have discriminated by a judicial tribunal or administrative agency, or when the beneficiaries of the preferences may not be identified as victims of such discrimination.

Because EEAC's members represent a wide variety of types of businesses, they have had both common and contrasting experiences with affirmative action. Almost all EEAC members are federal contractors and currently are implementing affirmative action plans to increase the numbers of women and minori-

[3] These include but are not limited of: contacts with minority organizations to refer minority applicants; briefing sessions and plant tours with minority applicants; participation in "Job Fairs" and other recruiting programs at schools and colleges; motivation programs; advertising in minority-oriented media such as newspapers and radio stations; and special training programs to increase the eduational and skill levels of minority employees. *See generally*, 43 F. R. 49253, § 60-2.24(e).

ties in their employ. Government contracting requirements, which are more stringent than Title VII's, compel them to adopt goals and timetables to remedy any underutilization of minorities or women in any job category, regardless of whether the imbalance is connected to any showing of past discrimination. The standards and techniques utilized by compliance officers to enforce these requirements have varied widely, especially as to the proper determination of the availability of minorities and women. See *infra*, pp. 16 & 18. Enforcement often has been so rigid that the contractors have had no real choice but to establish and reach the numerical goals through preferential employment practices or face government sanction procedures. Consequently, a broad ruling by this Court setting aside the affirmative action program in this case potentially could expose them to a barrage of reverse discrimination suits.[4]

Other EEAC members are parties to settlement or conciliation agreements, or consent decrees, which contain varying types of affirmative or preferential relief for women and minority workers. Thus, having undertaken, under court supervision or voluntarily, to change their employment practices to dis-

[4] As used here, "reverse discrimination suit" refers to the claim of a person, not a member of a class which is intended to be benefitted by affirmative action program, that he or she has been harmed by its implementation. Use of this term is not intended to imply that the particular employer involved previously has discriminated against minorities or women, or that discrimination against whites or males is governed by different standards than is discrimination against minorities. *Cf. McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); and *Trans World Airlines* v. *Hardison*, 432 U.S. 63, 71-72 (1977).

pose of allegations of discrimination, they are deeply concerned that a ruling adverse to Kaiser in this case could subject those agreements or decrees to reverse discrimination challenge resulting in employer liability.[5]

Moreover, employers face differing reactions from unions to affirmative action efforts, especially when seniority systems must be modified or set aside. For example, in the instant case, the Steelworkers adopted a nationwide policy of preferential treatment of minorities for admissions to craft training programs. (Steelworkers Cert. Pet. at 4-5). Other unions have demanded that employers provide them with exhaustive affirmative action and other EEO-related data which the unions openly plan to use as the basis of race and sex discrimination suits against the employers.[6] By contrast, other unions have strenuously resisted remedies imposed to remedy alleged past discrimination,[7] or have objected to government demands

[5] Judge Wisdom stated below that "the majority opinion leaves in question the status of consent decrees." (Pet. App. at 26a). See also fn. 36, *infra*.

[6] See e.g., *Westinghouse Electric Corporation and Int'l Union of Electrical Radio and Machine Workers, AFL-CIO-CLC*, 239 NLRB No. 19, October 31, 1978, *petitions for review and application for enfc't pending* Nos. 78-1769, 78-1777, and 78-1805 (4th Cir.), and Nos. 78-2067 and 78-2262 (D.C. Cir.); and *The East Dayton Tool and Die Co. and International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, and Its Local 668*, 239 NLRB No. 20, October 31, 1978, *petition for review and application for enfc't pending*, Nos. 78-2066 and 78-2261 (D.C. Cir.).

[7] See e.g., *EEOC* v. *American Telephone & Telegraph Co.*, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3803 (1978), and especially the petitions for writs of certiorari of the Alliance of Independent Telephone Unions, the Communications Workers of America and the Telephone Coordinating Council TCC-1, International Brotherhood of Electrical Workers.

that contractors alter neutral seniority systems in a manner that would violate existing collective bargaining agreements.[8] Thus, although employers must weigh such practical considerations when attempting to determine the consequences of their approach to affirmative action, their experiences vary widely depending upon the unions with which they are required to deal.

It is clearly apparent, therefore, that EEAC's members have substantial, albeit varied, interests in the legal issues presented to the Court in this case. As a group, EEAC's primary concern is that the uncertainty about the permissible extent of voluntary affirmative action finally be resolved one way or another, so that employers will know what steps they may lawfully undertake in the future. As explained below, it is not possible for employers to find any clear guidance or direction on these issues in existing court decisions or government policy pronouncements. Indeed, as we argued in our brief supporting the petitions for certiorari (p. 16), the present state of the law is such that employers and federal contractors have little recourse but to request this Court to clarify what types of affirmative action are legally permissible.

[8] See e.g., *Crown Zellerbach Corp.* v. *Marshall*, 441 F. Supp. 1110 (E.D. La. 1977), *appeal pending*, No. 77-3036 (5th Cir.); and *International Harvester Company* v. *Marshall, et al.*, Cause No. IP 77-159-C (S.D. Ind.), temporary restraining order dated March 25, 1977.

Since its organization, EEAC's members—which comprise a broad cross-section of employer interests —have engaged in extensive discussions in an attempt to adopt a consensus position to argue in cases raising challenges to voluntary affirmative action efforts. These discussions have demonstrated that there is no unanimity of opinion among employers concerning the legality of the affirmative action program adopted by Kaiser and the Steelworkers in the instant case, or by employers in other cases. Because of this lack of agreement, we take no position on the substantive legality of the program adopted here.

On the other hand, there is a clear consensus among employers that it is essential that this Court establish standards that will clarify the permissible scope of affirmative action in private sector employment in the future and, at the same time, protect employers against liability for actions taken in a good faith attempt to carry out affirmative action obligations in the present context of legal uncertainty. Because EEAC's members' interests in this case are at once so substantial and so complex, EEAC respectfully submits this brief *amicus curiae* in an effort to assist the Court by discussing the legal and practical contexts in which affirmative action controversies have arisen and by suggesting standards by which these issues might be resolved.

THE FACTS AND DECISION BELOW

The facts of this case are fully set forth in the party briefs and decision of the Fifth Circuit. For present purposes, they may be summarized as follows. In 1974, Kaiser and the United Steelworkers of

America ("Steelworkers") attempted to cure a sizable underrepresentation of minorities in Kaiser's craft workforce by entering into an agreement establishing an entrance ratio to a craft training program at each of 15 plants.

Under the program adopted, eligible employees were divided into minority and nonminority groups. Openings were to be filled on a one-for-one basis in order of seniority from within each group. If selection for these openings had been based solely on seniority, and if race had not been taken into account, no minority employees would have been eligible to be admitted. As a result, the underrepresentation of minority employees would have continued with no foreseeable likelihood of abating.

Beginning before 1969, and continuing up until the adoption of the 1974 agreement, Kaiser was under pressure from its federal contract compliance agency to increase its utilization of minorities in craft positions in order to comply with E.O. 11246. The program was adopted at least in part out of concern for possible enforcement proceedings and sanctions by the Office of Federal Contract Compliance Programs (OFCCP). (Pet. App. 2a-3a; Kaiser Cert. Pet. at 3).[*]

Kaiser also was faced with the fact that its employees' bargaining representative, the Steelworkers, had embarked upon a nationwide program to increase the number of minority craftsmen and to award craft-training vacancies to qualified blacks and other minorities until their statistical underrepresentation

[*] "Pet. App." references are to the appendix to Kaiser's petition.

was eliminated. (Steelworkers Cert. Pet. at 4-5). The same craft training program which it negotiated with Kaiser was contained in Steelworkers' agreements with other aluminum companies, the can industry and shortly was to be included in the national steel industry consent decree. See *United States* v. *Allegheny-Ludlum Industries*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

Brian Weber—a white employee at the Gramercy plant who had more seniority than some blacks selected—filed a Title VII suit alleging that he had been discriminated against on the basis of his race because he had not been selected for the program. The district court agreed.

On appeal, the Fifth Circuit majority found the craft admission program violated Title VII, and ruled that "[t]here can be no basis for preferring minority workers if there has been no discriminatory act that displaced them from their 'rightful place' in the [particular employer's] employment scheme." (Pet. App. 9a). The majority also rejected assertions that the training program was permissible because it was designed to correct past "societal" discrimination. (Pet. App. 16a). It reasoned that, in the absence of prior discrimination against an individual by the particular employer, a racial quota loses its character as an equitable remedy and "must be banned as an unlawful racial preference prohibited by Title VII, § 703(a) and (d)." (Pet. App. 15a).

The majority also rejected assertions that the implementing ratio contained in the craft program could be supported independently by reliance upon E.O. 11246. It concluded, broadly, that attempts of

the OFCCP to distinguish a numerical goal from a quota have "proved illusory, and most such goals suggested by the OFCC[P] can fairly be characterized as quotas." (Pet. App. 10a).[10] The majority then held that "[i]f E.O. 11246 mandates the training program at issue here, *in the absence of any prior hiring or promotion discrimination*, the executive order must fall before this direct congressional prohibition [in Title VII]." (Pet. App. 21a, emphasis in original).

In dissent, Judge Wisdom stated that the standard established by the majority was too strict. In his view, the majority decision posed an impossible dilemma for employers: the choice between Title VII discrimination proceedings or E.O. 11246 sanctions if an affirmative action plan is not adopted, and the possibility of "reverse discrimination" suits by disgruntled white employees if the plan is put into effect. He would have ruled that an affirmative action plan, adopted in a collective bargaining agreement, which is a reasonable remedy for an arguable violation of Title VII, should be upheld. He felt that a zone of reasonableness, within which the employer and the union would be sheltered from liability, would encourage private settlements. (Pet. App. 28a-29a).

SUMMARY OF ARGUMENT

The Court's ruling here could do much to resolve a dilemma now facing employers. Presently, employers who fail to adopt affirmative action plans to in-

[10] On this point, the majority relied on Silberman, "The Road to Racial Quotas," Wall St. J., Aug. 11, 1977, at 12, col. 4.

crease the numbers of minorities and women in their workforces risk loss of their federal contracts, exposure to agency complaints, and widespread publicity of alleged discrimination. On the other hand, employers who do adopt affirmative action programs which give job preferences to minorities and/or women may be found to have committed "reverse discrimination" against nonminority or male employees, who can be expected to demand monetary or other relief. Employers are thereby placed in the ironic and unfair position of facing liability to nonminorities and males because of good faith attempts to comply with requirements found in statutes, executive orders or other government directives intended to prevent discrimination against minorities and women. This dilemma is compounded by a significant split in court opinion over the permissibility of preferential treatment of minorities or women who have not been shown to be individual victims of discrimination by the particular employer involved.

Guidance is required from this Court that cannot be expected from the federal enforcement agencies. EEOC's recently adopted Affirmative Action Guidelines, which would sanction the broadest forms of affirmative action even where employer discrimination has not been demonstrated, would not be binding upon courts hearing individually brought reverse discrimination suits. Moreover, the chances of court reliance upon the Guidelines is diminished by the fact that, on several points, the Guidelines appear to be inconsistent with the government's own petition in this case. The most troublesome conflict is caused by the government's position here that if there is no reasonable ground for concluding that the employer

may have discriminated in the past, a race-conscious program may, as the court of appeals stated, "lose its character as an equitable remedy and * * * be banned as an unlawful preference prohibited by Title VII." (Cert. Pet. at 11).

EEAC does not take a position on the validity of the plan in question here. However, because employers now are forced to enact affirmative action programs without benefit of any clear legal standards, we submit that even if this Court agrees in principle with the majority below, it should not "charg[e]" potential reverse discrimination defendants "with predicting the future course of [the] law." *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967). Rather, until the permissible limits of voluntary affirmative action are established, the entity which enacts an affirmative action plan should not be held liable to employees who allege the plan is discriminatory if the plan was adopted:

a. in a good faith attempt to comply with the requirements of federal statutes and based upon a reasonable conclusion that it might be subject to liability thereunder; *or*

b. in a good faith attempt to comply with the requirements of E.O. 11246, or its supporting regulations; *and*

c. its actions in implementing the plan were reasonably related to these good faith objectives.

These standards should be applied to affirmative action efforts undertaken voluntarily, in a collective bargaining agreement, conciliation agreement, settlement agreement, consent decree, or otherwise. More-

over, the reasonableness of the employer's affirmative action efforts should be judged under the facts and legal standards existing when the plan was enacted.

In addition, even if reverse discrimination claims are upheld, remedies available to a "reverse discriminatee" should be *prospective* only and limited to injunctions against further implementation of the offending plan or portions thereof. If this Court affirms the decision below, it should indicate that back pay or other monetary relief would unfairly penalize employers who have attempted in good faith to comply with government requirements for the increased utilization of minorities or women. As in *City of Los Angeles* v. *Manhart*, 46 U.S.L.W. 4347, 4351-4354 (1978)—where retroactive monetary relief was denied to known discriminatees—the employer here is faced with an unclear state of the law and is caught in a dilemma. Monetary or other retrospective remedies, therefore, would work an undue hardship on employers who had acted in "good faith" to obey the law.

ARGUMENT

I. FEDERAL AGENCY REQUIREMENTS AND POTENTIAL TITLE VII LIABILITY PROVIDE STRONG IMPETUS FOR EMPLOYERS TO ADOPT AFFIRMATIVE ACTION PLANS.

A. Regulations Enforcing Executive Order 11246 Require Contractors To Develop and Implement Goals and Timetables to Remedy Any Statistical Underrepresentation of Minorities or Women Even Where Employer Discrimination Has Not Been Demonstrated.

Undoubtedly, the most forceful stimulus to employer affirmative action is Executive Order 11246 and supporting affirmative action regulations issued by the Secretary of Labor and administered through the Office of Federal Contract Compliance Programs (OFCCP).[11] As noted above, most of EEAC's members are among the 325,000 employers who also are federal contractors.

The Order and regulations require federal contractors to undertake a written workforce analysis and develop a written affirmative action compliance program for each of their establishments.[12] If a contractor's "utilization" of available minorities or women is numerically deficient, it must develop "goals and timetables" to overcome the underutilization in any particular job group. 43 F.R. 49250-51, §§ 60-2.10, 60-2.12. Government officials have stated repeatedly that, unlike Title VII, the statistical imbalances that trigger these affirmative action require-

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[11] See 43 F.R. 49240, *et seq.*, as corrected 43 F.R. 51400.

[12] Revised Order No. 4, 43 F.R. 49249, *et seq.*, Part 60-2.

ments *need not be connected to any showing of past or present discrimination.*[13]

In determining whether minorities or women are sufficiently utilized in the employer's workforce, the proportion of protected group members in that workforce is compared with the *availability* of these groups in the appropriate labor market area. A determination of such availability forms the basis for developing goals and timetables. There is, however, no common understanding of the concept within the federal sector or among interested parties in the private sector. Consequently, this causes several problem areas which complicate the enforcement of E.O. 11246. As set forth in Flanagan, Milkovich, Freeman, Bayer & Glazer, *Perspectives on Availability*, EEAC (1978), p. 3, these include:

a) The lack of a single, accepted definition of availability;

b) Uncertainty as to the proper standard of comparison;

c) Doubt as to the appropriate labor market area; and

d) The difficulty of computing availability within the confines of federal regulation.

Compare the standard of *Hazelwood* v. *U.S.*, 433 U.S. 299, 308 n.13 (1977) (qualified) *with* EEOC's Affirmative Action Guidelines, 44 F.R. 4422, 4425 ("qualified or qualifiable").

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[13] See *Hearings on S. 2115, etc., Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92nd Cong., 1st Sess.* 77, 88 (1971) ("Hearings"); Nash, "Affirmative Action Under Executive Order 11246," 46 N.Y.U. L. Rev. 225, 229-230 (1971).

As a result, there often are differences of opinion between compliance and contractor personnel over whether underutilization actually exists. Nevertheless, failure to comply with agency demands subjects the contractor to severe sanctions, such as cancellation or termination of all federal contracts (or any part thereof); withholding progress payments on a contract; or, debarment from future contracts. See E.O. 11246, Section 209; 43 F.R. 49246, § 60-1.26; 43 F.R. 49249, § 60-2.2(b); and 43 F.R. 49259, § 60-30.

Even more compelling pressures on employers stem from past interpretations of OFCCP and Labor Department officials, with which we disagree, that regulations permit them to declare a contractor nonresponsible because of the alleged affirmative action program deficiencies, and then to pass over that contractor for at least two additional contracts even *before* any hearing has been held on the compliance issues.[14]

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[14] See, e.g., *Pan American World Airways* v. *Marshall*, 439 F. Supp. 487 (S.D.N.Y. 1977); *Crown Zellerbach* v. *Marshall*, *supra*, 441 F. Supp. 1110, *appeal pending*, No. 77-3036 (5th Cir.), *injunction pending appeal against passover* issued November 17, 1977; *Sundstrand Corp.* v. *Marshall*, 17 FEP Cases 432 (N.D. Ill. 1978); and *Illinois Tool Works* v. *Marshall*, —— F. Supp. ——, 17 FEP Cases 520 (N.D. Ill. 1978). These decisions cast serious doubt on the validity of the passover policy. A study by the Administrative Conference of the United States found that ". . . in practice cancellation is rarely used." The more common sanction ". . . is the declaration of nonresponsibility of an employer." The Conference also noted that, unlike the procedures leading to other sanctions, such as debarment or cancellation of a contract, "no opportunity for prior hearing is afforded in connection with a declaration of

In addition to these rigorous sanctions for not complying with OFCCP regulations, federal contractors have faced a confusing lack of standards greater than the uncertainty about their Title VII obligations. These problems were highlighted by an internal OFCCP Special Task Force created to review that agency's performance and to develop a plan for its improvement. In its Preliminary Report,[15] the Task Force observed that (Report at 147):

> [T]he nonresponsibility determination and passover concepts assume that both the Government and the contractor possess some reasonably finite knowledge of the scope and reach of equal employment opportunity law. In reality, EEO law is constantly evolving with many issues largely unsettled.[16]

The adverse consequences attendant upon the imposition of contract sanctions without definitive enforcement standards was highlighted by the Task Force, which observed:

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nonresponsibility." *See* Recommendation No. 75-2 of the Administrative Conference of the U.S., 40 Fed. Reg. 27926 (1975).

[15] "A Preliminary Report On The Revitalization of the Federal Contract Compliance Program", U.S. Department of Labor, Office of Federal Contract Compliance Programs Task Force, September, 1977 ("Report").

[16] Mr. Justice Powell in his concurring opinion in *Nashville Gas Company* v. *Satty*, 434 U.S. 136, 148 (1977), voiced the same concern in a somewhat different context when he observed that "[g]iven the meandering course that Title VII adjudication has taken, the final resolution of a lawsuit in this Court often has not been possible because the parties in the lower courts proceeded on what was ultimately an erroneous theory of the case."

> [B]ecause of latitude compliance officials have in making compliance determinations (arising largely from the absence of reasonably precise data on availability, and the absence of reasonably definitive written guidance setting forth definitions of discrimination and criteria for proving and remedying such discrimination), contractors argue that the application of the nonresponsibility and passover procedures subjects them to arbitrary and capricious decisions. [Report at 145].

In the view of the Task Force, such complaints have merit:

> [U]ntil such time as OFCCP codifies and demonstrates its ability to require rigid adherence by compliance officers to reasonably definitive and objective standards for compliance decisions the fears of contractors will remain somewhat justified. [Report at 147].[17]

A prime example of the inconsistencies faced by employers attempting to comply with the requirements of Title VII and E.O. 11246 is the OFCCP's

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[17] The Task Force found that the confusion was caused in part by the fact that the government's contract compliance program was fragmented among numerous compliance agencies spread among many different executive departments. (Report at 42-45). On October 5, 1978, President Carter signed Executive Order 12086 (43 F.R. 46501), consolidating the contract compliance program into the Department of Labor. The primary purpose of the reorganization was to provide better coordination for E.O. 11246 enforcement. As this reorganization and related personnel retraining have been undertaken only recently, however, it is too early to determine whether the problems previously seen in the program have been rectified. Past experience provides little basis for optimism as to the practical resolution of these deep-seated problems.

position that it may disregard this Court's decision in *Teamsters* v. *United States, supra*, 431 U.S. 324, and find seniority systems violative of E.O. 11246 even if they are protected from Title VII attack. See Appendix, *infra*. The agency adheres to this position even though it has been rejected by the courts. See *United States* v. *East Texas Motor Freight System, Inc.*, 564 F.2d 179, 184-86 (5th Cir. 1977); and *United States* v. *Lee Way Motor Freight, Inc.*, —— F. Supp. ——, 15 FEP Cases 1385, 1395, 1396-1398 (W.D. Okla. 1977), *appeal pending*, Nos. 78-1096, 78-1097 and 78-1098 (10th Cir.). (Order does not authorize individual seniority or back pay relief). As a result, employers may face OFCCP affirmative action demands which are directly contradictory to their *bona fide* contractual obligations.

Where such uncertainty exists in tandem with sanctions for not complying with compliance officer demands, it is not surprising that some affirmative action efforts urged upon contractors through agency pressure may be undertaken without reasoned assurance that they will withstand subsequent judicial scrutiny. Because, however, sanctions for noncompliance are so severe and the opportunities to challenge OFCCP and compliance agency policies so restricted, compliance with the agency's affirmative action requirements is generally the only practical course available to employers whose business is directly or indirectly dependent to any substantial degree on government contracts.[18]

[18] In 1971, then Under Secretary of Labor Laurence H. Silberman testified concerning the OFCCP's program that "[i]n fact we have so much clout over government contractors that very few of them are willing to or want to fight that through litigation. They usually come into compliance." See *Hearings, supra* n. 13, at 89-90. Mr. Silberman also testified that ". . . our program is not enforcement minded. The idea is that we have such tremendous sanctions that every time we go to use it, the contractor falls into compliance . . ." (*Id.*, at 90).

One district court judge has characterized the OFCCP's attempt to pass over a contractor without a hearing as "economic coercion." See *Pan American World Airways* v. *Marshall, supra*, 439 F. Supp. at 495. There, the contract, which was worth several hundred million dollars, was "vital to [the contractor's] economic vitality." (*Id.*). In ruling that the agency's passover policies were illegal, the court also noted that Pan American had no adequate remedy at law because a contractor who successfully challenged its loss of a contract award could only recover its bid preparation costs, and would be unable to receive lost profits. 439 F. Supp. at 497.

B. Prudent Employers Often Must Adopt Affirmative Action Plans to Avoid Potential Findings of Discrimination Under Federal Statutes.

This Court has stressed that the "primary" objective of Title VII is the removal of barriers to minorities "that have operated in the past to *favor* an identifiable group of *white* employees over other employees." See *Griggs* v. *Duke Power Company*, 401 U.S. 424, 429-430 (1971) (emphasis added); and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975). It also is clear that voluntary compliance is the "preferred means" of eliminating employment discrimination (*Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974)), and that employers are required to "self-examine and to self-evaluate their employment practices [under Title VII] and to eliminate, so far as possible, the last vestiges of their discriminatory practices." (*Teamsters* v. *United States, supra*, 431 U.S. 364).

Employers who analyze their workforce statistics and determine that there may be potential Title VII liability may conclude that affirmative efforts are required so that their workforces more closely mirror the racial or sexual composition of the workforce in the appropriate labor market. Such a reaction would be most likely from employers who find it would be difficult to rebut a *prima facie* case of discrimination under standards established by this Court,[19] or from those (like Kaiser) whose initial affirmative efforts to increase utilization of minorities have been unsuccessful.

Even when it is not certain that an employer has discriminated, a self analysis of the surrounding circumstances may lead it to conclude that affirmative action efforts should be undertaken voluntarily, through settlements or by consent decree. Several factors are relevant such as: a desire to remedy the effects of past discrimination, the possibility of time consuming and costly processing of discrimination complaints, the uncertainty of the outcome of litiga-

[19] See *Int'l. Brotherhood of Teamsters* v. *United States, supra,* 431 U.S. at 340; *Hazelwood School District, et al.* v. *United States, supra,* 433 U.S. 299; *Furnco Construction Corp.* v. *Waters,* 46 U.S.L.W. 4966 (1978); and *Board of Trustees of Keene State College* v. *Sweeney,* 47 U.S.L.W. 3330, 18 FEP Cases 520 (1978). Under these standards, an employer need only articulate "some legitimate, nondiscriminatory reason" for its conduct in order to rebut a Title VII *prima facie* case. See *Board of Trustees* v. *Sweeney, supra,* 47 U.S.L.W. at 3331. This standard contrasts markedly with the requirements of E.O. 11246 regulations that any underutilization of minorities or women must be rectified, regardless of whether it was caused by discrimination. See *supra,* pp. 15-16.

tion, as well as a desire to avoid wasteful and expensive litigation. The public policy of encouraging voluntary compliance could hardly be achieved if such actions were permitted only when discrimination could be established to a certainty.[20]

Furthermore, employers are aware that a large majority of the United States Courts of Appeals have considered it within their equity jurisdiction to approve the use of accelerated hiring goals or quotas to eliminate the effects of past proven discrimination. See *Van Davis* v. *County of Los Angeles,* 566 F.2d 1334, 1343 (9th Cir. 1977), *cert. granted,* No. 77-1553, 46 U.S.L.W. 3780 (1978), *decision pending,* and cases collected therein. Although these decisions do not involve voluntary affirmative action efforts, they provide some indication that positive efforts may be required to overcome the effects of past employer discrimination.

From the foregoing, it is evident that federal statutory, judicial or administrative employment standards and enforcement requirements have had an important effect on increasing employer affirmative action efforts. In fact, there may be compelling reasons for employers to increase their utilization of minorities and women even when they do not believe they have engaged in past discriminatory practices. As we now show, however, their attempts to comply with government requirements have placed employers

[20] See *Florida Trailer & Equipment Co.* v. *Deal,* 284 F.2d 567, 571 (5th Cir. 1960). Cf. *United States* v. *Allegheny Ludlum Industries,* 517 F.2d 826, 11 FEP Cases 167, 186, 192 (5th Cir. 1975), *cert. denied,* 425 U.S. 944 (1976).

in the unfair position of having to face potential liability to white, male or other persons alleging they have been harmed by those affirmative action efforts.

II. COURT DECISIONS RAISE DOUBTS ABOUT THE PERMISSIBLE LIMITS OF AFFIRMATIVE ACTION AND CREATE A DILEMMA FOR EMPLOYERS THAT ONLY THIS COURT CAN RESOLVE.

A. Conflicting Lower Court Decisions Provide No Clear Guidance to Employers Seeking to Comply Voluntarily With Title VII and E.O. 11246.

The majority and dissenting opinions of the court below have increased the uncertainty over whether affirmative action programs adopted to remedy underutilization of minorities in an employer's workforce are permissible under Title VII and E.O. 11246 in the absence of findings that an employer has engaged in acts of past discrimination against the specific identified individuals who are beneficiaries of the program. The decision below requires employers to establish findings that they have engaged in discriminatory practices and then limit preferential treatment to identifiable victims of their discrimination.[21] In other contexts, however, other courts of appeals have suggested that preferential affirmative class relief is not necessarily limited to identifiable

[21] See also *Detroit Police Officers Ass'n* v. *Young*, 446 F. Supp. 979 (E.D. Mich. 1978), *appeal pending*, No. 78-1163 (6th Cir.); *Hiatt* v. *City of Berkeley*, 18 FEP Cases 233 (Cal. Ct. App. 1978); and *Hull, et al.* v. *Cason, et al.*, 1 Civ. Nos. 38801, 40034, 41036 (Cal. Ct. App., December 28, 1978). Cf. *Sledge* v. *J. P. Stevens & Co.*, 585 F.2d 625, 18 FEP Cases 261, 275 (4th Cir. 1978) ("Our reading of the several opinions in [the *Bakke* case] indicates that the imposition of hiring quotas in Title VII cases is still an open question . . .").

victims. See *e.g.*, *Carter* v. *Gallagher*, 452 F.2d 315, 328-330 (8th Cir. 1971) (*en banc*), *cert. denied*, 406 U.S. 950 (1972); *EEOC* v. *American Telephone & Telegraph Co.*, *supra*, 556 F.2d 167, 175-176; *Van Davis* v. *County of Los Angeles*, *supra*, 566 F.2d 1334, 1343; and *IBEW Local 35* v. *City of Hartford, et al.*, —— F.Supp. ——, 18 FEP Cases 1338 (D. Conn. 1978).[22]

Additionally, the Fifth Circuit held below that the underutilization of minorities in craft positions was not a legally sufficient reason to permit the racial preference. (Pet. App. 16a-17a). Kaiser argued that its craft admission plan was justified by the disproportionately small share of its workforce held by minorities and its knowledge that its requirement for prior experience for craft applicants had a "disparate impact" on blacks because of their former exclusion from craft unions. (Kaiser Cert. Pet. at 4-5). The Fifth Circuit, however, found that under the circumstances of this case, the remedial plan "could not be approved even if it had been judicially imposed." (Pet. App. 14a).[23]

[22] Similarly, the *Bakke* opinions of Justices Brennan and Powell disagreed over whether the Constitution permits a state institution to afford minority group members preferential treatment to remedy past societal discrimination when there has been no showing that the institution itself engaged in discriminatory practices.

[23] See also *Lewis* v. *Tobacco Workers*, 577 F.2d 1135, 17 FEP Cases 622, 627 (4th Cir. 1978), *cert. denied*, No. 78-696, 47 U.S.L.W. 3449. ("... § 703(j) [of Title VII] forbids court ordered preferential treatment designed solely to achieve a racial balance, as well as the formulation of liability based merely on the lack of racial balance."). *Cf.*, *Furnco Construction Corp.* v. *Waters*, *supra*, 46 U.S.L.W. at 4970.

By contrast, in *Prate* v. *Freedman*, 583 F.2d 42, 46-47 (2d Cir. 1978), the Second Circuit approved a consent judgment establishing a plan for preferential hiring of minority groups. Although there were no findings or admissions of past employer discrimination, the court stated that a decree "designed to remedy the disproportionate impact of prior employment practices amounted to an admission of unlawful discrimination." 17 FEP Cases at 1575-76. Indeed, in rejecting challenges to the decree by white police applicants, the court awarded attorneys fees to the parties defending the hiring preference, and characterized the plaintiffs' suit as "unreasonable and vexatious."

Recognizing the split in court authority, Judge Wisdom pointed out in his dissenting opinion below that (Pet. App. 26a-27a):

> The employer and the union are made to walk a high tightrope without a net beneath them. On one side lies the possibility of liability to minorities in private actions, federal pattern and practice suits, and sanctions under Executive Order 11246. On the other side is the threat of private suits by white employees and, potentially, federal actions. If the privately imposed remedy is either excessive or inadequate, the defendants are liable. Their good faith in attempting to comply with the law will not save them from liability, including liability for back pay. *See Albermarle Paper Co.* v. *Moody*, 1975, 422 U.S. 405, 422-23, 95 S. Ct. 2362, 45 L. Ed. 280.[24]

[24] As discussed below, however, there are several considerations that would make back pay to reverse discriminatees an inappropriate remedy. See *infra*, pp. 38-41.

It also was noted that "[d]ifferent courts may apply the law in arguably proper distinct ways," and that determining the result a court would reach in any Title VII litigation is "no small problem" (Pet. App. 26a). Because of the potential for varying circuit court interpretations of the validity of affirmative action programs, voluntary compliance with Title VII, especially by way of nationwide collective bargaining, is rendered particularly difficult. (Pet. App. 26a).

Given these conflicting judicial interpretations of Title VII, employers and unions attempting to comply voluntarily with Title VII take the chance of being liable "unless they instituted exactly what a reviewing court felt should have been instituted." (Pet. App. 27a). Their alternatives, therefore, would be to "either bring declaratory judgment actions, or wait to be sued." (*Ibid.*) Without guidance from this Court, however, such additional litigation not only would be burdensome, but unlikely to provide sufficient clarification for employers whose operations are not located solely within one judicial circuit.

B. Guidance From the Federal Enforcement Authorities is Insufficient to Clarify the Issues.

In an attempt to resolve the employers' dilemma and to spur employers to undertake more aggressive voluntary affirmative action, EEOC has issued its final Affirmative Action Guidelines.[25] Under the Guidelines, EEOC would make a determination of "no reasonable cause" concerning "reverse discrimination" charges filed with it if an employer could

[25] 44 F.R. 4422, January 19, 1979.

demonstrate that its self analysis provided a reasonable basis to conclude that affirmative action is "appropriate" and the action taken has a reasonable relationship to the problems revealed by the self analysis. Affirmative action efforts taken in accordance with E.O. 11246 also will qualify under the Guidelines. 44 F.R. 4423-24, 4428.[26] Further, the Guidelines state that:

> It is not necessary that the self analysis establish a violation of Title VII. This reasonable basis exists without any admission or formal finding that the person has violated Title VII, and without regard to whether there exist arguable defenses to a Title VII action. [Guidelines, Section 1608.4(b)].

They also provide:

> [The AAP may be adopted] *regardless of whether the persons benefitted were themselves the victims* of prior policies or procedures which produced the adverse impact or disparate treatment or which perpetuated past discrimination. (Emphasis added). [Guidelines, Section 1608.4 (c)].

EEOC would permit interim goals which are *higher* than the workforce *availability* of protected groups, as long as those selected are "qualified or *qualifiable* applicants." (Emphasis added). 44 F.R. at 4425.

EEOC acknowledges that its Guidelines directly conflict with the majority decision below (44 F.R. at 4425 n.1). The Guidelines, however, only provide assurance against reverse discrimination suits brought by EEOC. Upon receipt of a "no reasonable cause" determination from EEOC, the alleged reverse discriminatee could obtain a right to sue notice from the agency and bring a private lawsuit.[27] In that proceeding, the Guidelines will not have the force and effect of law, nor will they be controlling upon the court,[28] especially in view of the Commission's past limited interpretations of Section 713(b) of Title VII. That provision—the primary legal authority for the Guidelines—provides a defense to Title VII liability to a respondent who acts in good faith reliance on any written interpretation of the Commission. In our view, the protections of Section 713(b) should be

[26] It should be noted that in a recent advisory opinion, a Department of Labor Administrative Law Judge concluded that in light of the *Bakke* decision of this Court and the Fifth Circuit's decision below in *Kaiser* v. *Weber*, there is a substantial question of law as to whether the imposition of goals and timetables under E.O. 11246, absent a finding of discrimination, conflicts with the Constitution and Title VII. See Advisory Opinion of Administrative Law Judge Burton Sternburg *In the Matter of Firestone Synthetic Rubber & Latex Co., Orange, Texas*, Case No. 78-OFCC-13, December 8, 1978, Daily Labor Report No. 243, December 18, 1978, at F-1. In his decision, the judge noted that the government's petition for certiorari in the instant case indicated that the establishment of quotas and/or preferences absent a finding of discrimination may be illegal. A further discussion of the government's petition is set forth below at pp. 31-33. Cf., Silberman, *supra*, n. 10.

[27] See Section 706(f)(1) of Title VII; and *Occidental Life Insurance Company of California* v. *EEOC*, 432 U.S. 355, 360-361 (1977).

[28] *General Electric* v. *Gilbert*, 429 U.S. 125 (1976); *Trans World Airlines* v. *Hardison*, 432 U.S. 63 (1977); and *City of Los Angeles* v. *Munhart*, 46 U.S.L.W. 4347, 4352 n. 36 (1978) ("[the District Court] should not have given conclusive weight to the EEOC Guideline.")

construed liberally.[29] But past EEOC interpretations have stated that opinion letters must set forth the stated factual assumptions of the individual case, and may be relied upon only by the specific addressees.[30] By contrast, the Guidelines purport to sanction virtually all forms of affirmative action, even though specific programs need not be reviewed or approved by EEOC until *after* the plans are put into effect and a reverse discrimination charge is filed.

Another point overlooked by EEOC is that Section 713(b)'s protections apply only to Title VII. There is no assurance, therefore, that the Guidelines would protect employers against reverse discrimination suits brought under 42 U.S.C. § 1981 or other sections of the Civil Rights Act of 1866 (see *e.g.*, *McDonald* v. *Santa Fe Trail Transp. Co.*, *supra*, 427 U.S. 273)), or under state antidiscrimination statutes (see *e.g.*, *Hiatt* v. *City of Berkeley*, *supra*, 18 FEP Cases 233).

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[29] See e.g., *Yott* v. *North American Rockwell Corp.*, 428 F. Supp. 763, 768 (C.D. Cal. 1977) (". . . the EEOC cannot by regulations or otherwise put a limitation on who can claim [Section 713(b)'s] benefits.") See also footnote 36, *infra*, concerning consent decrees and Section 713(b).

[30] See 29 C.F.R. §§ 1601.31, 1601.32 and 1601.33; EEOC Policy Statement, 35 F.R. 18692, December 9, 1970; EEOC Decision No. 75-147, January 13, 1975, 2 CCH Employment Practice Guide ¶ 6447; and EEOC Decision 74-76, January 18, 1974, CCH Employment Practice Guide ¶ 6446. Cf. *Local 189, United Papermakers* v. *U.S.*, 416 F.2d 980, 987 (5th Cir. 1969), *cert. denied*, 397 U.S. 919; *Sprogis* v. *United Air Lines*, 444 F.2d 1194 (7th Cir. 1971), *cert. denied*, 404 U.S. 991; and *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006. On January 19, 1979, EEOC redefined "written interpretation or opinion of the Commission" to include a no reasonable cause determination issued pursuant to the Guidelines. See 44 F.R. 4429-30.

In addition, inasmuch as the Guidelines would permit individual employer affirmative action even when there is no evidence sufficient to prove the employer violated Title VII, and before there is a related finding of discrimination "by judicial, legislative, or administrative bodies with competence to act in this area,"[31] there also are questions raised as to whether the Guidelines comply with the standards of the *Bakke* decision.[32] Thus, the Guidelines are inadequate to provide assurance against employer reverse discrimination liability in a private Title VII suit.

Even more confusion is added when the government's petition for certiorari is compared with the Guidelines. In the Guidelines, EEOC and the Solicitor General state that the decision below is "incorrect" and that "the affirmative action program there was lawful." 44 F.R. at 4425 n.1. Moreover, EEOC's Guidelines assume that preferential treatment may be given to "qualifiable" persons who are not identified as victims of discrimination, and where past discrimination by the employer has not been shown. In their petition, however, the agencies set forth a different legal standard (Cert. Pet. at 11):

> In our view, Title VII permits affirmative remedial action by an employer and a union who have a reasonable factual basis for concluding

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[31] *See The Regents of the University of California* v. *Bakke*, *supra*, 98 S. Ct. 2757-2758, 2766 (Opinions of Justices Powell and Brennan).

[32] In the Supplementary Information accompanying the Guidelines, EEOC concludes without analysis that the Guidelines are consistent with the *Bakke* decision. But its rationale states only that in *Bakke*, the University did not assert reliance "on any detailed guidance and procedures for crafting an affirmative action plan." 44 F.R. at 4425.

> that a plaintiff could establish a *prima facie* case of employment discrimination with respect to the plant and jobs in question. Where there is no reasonable ground for concluding that the employer may have discriminated in the past, a race-conscious program may, as the court of appeals stated, "lose its character as an equitable *remedy* and * * * be banned as an unlawful racial *preference* prohibited by Title VII" (App. A, *infra*, p. 18a). (Emphasis in original).

And whereas the Guidelines state that "[i]t is not necessary that the self analysis establish a violation of Title VII," and need only show that affirmative action is "appropriate" (see *supra*, p. 28), the government's petition asks this Court to remand the case to the district court for another hearing to determine whether there is any evidence, not now in the record, of discrimination by either of the party defendants (U.S. Cert. Pet. at 11, 15-17, 19-20). By obvious implication, the government's request means—in contradiction to the Guidelines—that clear evidence of discrimination and not just underutilization of minorities, may be necessary to support a voluntary affirmative action program. And although the government's petition states that discrimination need not always be established in court to support voluntary affirmative action (Cert. Pet. at 11), the evidence it asserts would be required on remand (Cert. Pet. at 19) seems to establish a more demanding standard than that required by the Guidelines.

Adding another bit of inconsistency, EEOC's explanation of the Guidelines criticizes the decision below, finding it "fundamentally unfair to expose those subject to Executive Order No. 11246 to risks of liability under Title VII when they act in compliance

with government requirements. . . ." (44 F.R. at 4425). The government's petition, on the other hand, urges that this case should be remanded, arguing that it is not clear from the present record whether the action taken by Kaiser and Steelworkers was consistent with E.O. 11246 (Cert. Pet. at 16-17).

When the primary government agencies charged with enforcing the federal civil rights statutes are unable to agree upon the appropriate legal standards governing affirmative action, it hardly seems reasonable to expect that courts would defer to Guidelines that do not represent a uniform view. It then follows that employers could not rely upon the government's Guidelines with any degree of confidence.

III. THE COURT SHOULD FORMULATE PRINCIPLES THAT PROVIDE GUIDANCE FOR EMPLOYERS WHO MUST RECONCILE AFFIRMATIVE ACTION REQUIREMENTS WITH POTENTIAL REVERSE DISCRIMINATION LIABILITY.

A. The Liability Standards Which Should Govern Voluntary Affirmative Action.

The dilemma described above can only be resolved by this Court. Until guidance is given, employers will face the prospect of lawsuits from competing interests. On the one hand are investigations and suits from state or federal EEO agencies, minorities or women for failure to establish resulted-oriented affirmative action programs; on the other are suits filed by persons alleging they have been harmed by the affirmative action plans. The same problem confronts federal contractors who face sanctions for not complying with OFCCP demands but have no clear immunity from claims of reverse discrimination. In

our view, it does not follow inexorably that an affirmative action plan found to discriminate against nonminorities should result in *liability* being assessed against an employer. The resolution of this dilemma is basically a question of equity, and

> "In equity as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests . . ." *Lemon* v. *Kurtzman*, 411 U.S. 192, 201 (1973) (Burger, C.J.)[33]

One way to resolve the dilemma, of course, would be for the Court to reverse the Fifth Circuit below and hold that the *voluntary* affirmative action program of Kaiser and the Steelworkers did not violate Title VII. Arguments for or against that position are not advanced here but will be presented fully by the parties and other *amici*.[34]

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[33] Accord: *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 777-778 n. 38, 789-780 (1976) (Opinions of Justices Brennan and Powell).

[34] In this regard, EEAC submits that the issues presented in this case involve the permissible limits of *voluntary* affirmative action. That issue, however, is distinguishable from the separate question of whether employers may be *compelled* by the government to undertake preferential numerically based relief to remedy societal discrimination. Our reading of this Court's decisions indicates that where past discrimination by a specific employer has not been shown to have been a factor contributing to a racial imbalance between an employer's workforce and the workforce in the appropriate labor market, preferential hiring of minorities to cure the imbalance cannot be required. As stated in *Furnco Construction Corp.* v. *Waters*, 46 U.S.L.W. at 4970, the obligation imposed upon employers is to provide "an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work-

On the other hand, should the decision below be affirmed, limits should be placed on reverse discrimination liability. Because employers are faced with unprecedented confusion over the applicable legal standards, we submit that this Court should not "charg[e]" potential reverse discrimination defendants "with predicting the future course of [the] law." *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967).[35]

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force." See also *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 430 ("In short, the Act does not *command* that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group.) (Emphasis added).

Indeed, even the *Bakke* opinion of Mr. Justice Brennan, which was strongly supportive of voluntary affirmative action, stated that ". . . Title VII clearly *does not require* employers to take action to remedy the disadvantages imposed upon racial minorities by hands other than their own . . ." 98 Sup. Ct. at 2775 (emphasis added). Justice Brennan noted, however, that such an objective was consistent with the remedial goals of the statute. Along similar lines, Judge Wisdom stated in his dissent below that "[w]hile the government *might not be able to require* that restorative justice be done, neither should it prevent it." (Pet. App. at 38a) (emphasis added.)

Finally, this Court's school desegregation decisions also support this distinction. *See e.g., Swann, et al.* v. *Charlotte-Mecklenburg Board of Education, et al.*, 402 U.S. 1, 16 (1971) ("To [prescribe a ratio of Negro to white students reflecting the proportion for the district as a whole] as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authortiy of a federal court.") (Emphasis added). *Accord, Milliken* v. *Bradley*, 418 U.S. 717, 744 (1974); and *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 417 (1977).

[35] The holding of *Pierson* v. *Ray* has been cited specifically in several Title VII cases as authority for denying back pay

Fundamental principles of fairness indicate that until the permissible limits of voluntary affirmative action are established, the entity which enacts an affirmative action plan should not be held liable to an employee who alleges the plan is discriminatory as to him or her, if the plan was adopted:

a. in a good faith attempt to comply with the requirements of federal statutes and based upon a reasonable conclusion that it might be subject to liability thereunder; *or*

b. in a good faith attempt to comply with the requirements of E.O. 11246, or its supporting regulations; *and*

c. its actions in implementing the plan were reasonably related to these good faith objectives.

Application of these standards should not require that an employer admit a Title VII violation, or await a judicial determination of liability. Requiring admissions of discrimination would invite suits from minorities or women and discourage voluntary compliance. Requiring an official finding of discrimi-

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claims when employers had acted in good faith attempts to comply with existing statutory requirement. *See, e.g., Ridinger* v. *General Motors*, 325 F. Supp. 1089, 1098 (S.D. Ohio 1971), *aff'd in rel. part after remand*, 7 EPD ¶ 9395 (S.D. Ohio 1973); *LeBlanc* v. *Southern Bell Telephone and Telegraph Co.*, 333 F. Supp. 602, 611, (E.D. La. 1971, *aff'd*, 460 F.2d 1228 (5th Cir. 1972), *cert. denied*, 409 U.S. 990; *Wernet* v. *Pioneer Foods Co.*, 6 EPD ¶ 8799 (D. Ohio 1972), aff'd sub nom., *Wernet* v. *Amalgamated Meat Cutters and Butcherman Local 17*, 484 F.2d 403 (6th Cir. 1973); *Richards* v. *Griffith Rubber Mills*, 300 F. Supp. 338, 341, 2 EPD ¶ 10,001 (D. Ore. 1969). *See also Hupart* v. *Board of Higher Education*, 420 F. Supp. 1087 (S.D.N.Y. 1976). *Cf. Wood* v. *Strickland*, 420 U.S. 308, 319-22 (1975).

nation would strain the resources of our legal system and impede employers from increasing their utilization of minorities or women until actually charged and found guilty of discriminating against them.

These standards for relief from liability should be applied to affirmative action efforts undertaken voluntarily, in a collective bargaining agreement, conciliation agreement, settlement agreement, consent decree,[36] or otherwise. Moreover, an alleged reverse discriminatee should not be able to premise liability upon a consent decree whose provisions would have been sustainable when enacted. As noted above, p. 18 and n. 16, civil rights principles are changing rapidly, and it would be unfair to base subsequent reverse discrimination liability upon later legal developments which might have lessened the possibility of liability to minorities or women had those principles been in

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[36] As this Court stated in *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 423 n. 17, Title VII itself recognizes a complete, but very narrow immunity for employer conduct shown to have been taken 'in good faith, in confirmity with, and in reliance on any written interpretation or opinion of the [EEOC].' [Section 713(b)] 42 U.S.C. § 2000e-12(b)." It recently has been found that a consent decree and its accompanying documents "certainly constitute such an interpretation or opinion." See *EEOC* v. *American Telephone & Telegraph Co.*, 419 F. Supp. 1022, 1055 n. 34, (E.D. Pa. 1976), *aff'd EEOC* v. *American Telephone & Telegraph Co.*, *supra*, 556 F.2d 167.

We note also that in his *Bakke* opinion, Mr. Justice Powell stated that "[t]his case does not call into question congressionally authorized administrative actions such as consent decrees under Title VII . . ." See 98 Sup. Ct. at 2755 n. 41. Section 713(b) is discussed also *supra*, at pp. 29-30.

effect when the decree was approved. See e.g., *United Airlines, Inc.* v. *Evans*, 431 U.S. 553 (1977).[37]

B. If Reverse Discrimination Claims Are Permitted, Remedies Should Be Prospective Only.

Our position that equitable principles should be applied to limit employer reverse discrimination liability is supported by analogous decisions of this and other Courts holding that back pay awards are not appropriate under certain circumstances. These decisions, discussed below, also support a conclusion that even if reverse discrimination claims are upheld, remedies available to a "reverse discriminatee" should be *prospective* only and limited to injunctions against further implementation of the affirmative action program. We submit, therefore, that if this court affirms the decision below, it should indicate that back pay or other monetary relief to reverse discriminatees would unfairly penalize employers who have attempted in good faith to comply with government

[37] It is a well understood principle that voluntary action, settlements and consent decrees are entered into with an awareness on all sides that a degree of uncertainty is to be expected and that a settlement should not be judged on whether its terms are the equivalent of what could have been obtained after a full trial. See *United States* v. *Armour Co.*, 402 U.S. 673, 681-682 (1971); *Florida Trailer and Equipment Co.* v. *Deal*, 284 F.2d 567, 571 (5th Cir. 1960); and *Cotton* v. *Hinton*, 559 F.2d 1326, 15 FEP Cases 1342, 1344 (5th Cir. 1977). Moreover, certain courts have rejected attacks on Title VII consent decrees based on later substantive Supreme Court holdings. *Stewards* v. *American Airlines*, —— F.2d ——, 17 FEP Cases 24, 27 (7th Cir. 1978); and *EEOC* v. *Bethlehem Steel Corp.*, —— F. Supp. ——, 16 EPD (CCH) ¶ 8245 (W.D.N.Y. 1978), pp. 5268-69.

requirements for the increased utilization of minorities or women.[38]

The decision in *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 421, held that back pay may be denied when its award would frustrate the central statutory purpose of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. Recently, those principles were applied by this Court when it denied retroactive monetary relief to known discriminatees. See *City of Los Angeles* v. *Manhart*, *supra*, 46 U.S.L.W. at 4351-4354 and n. 38. Several factors were stressed. First, the defendants did not have the benefit of a clear definition of the law and may have assumed that their program was lawful. Further, the employer was "in a dilemma: he [was] damned in the discrimination context no matter what he [did]." (*Id.*, 46 U.S.L.W. at 4352, n. 38). Moreover, had the employers changed the practices ultimately found illegal, a profound effect on the economy would have resulted.[39] Finally, the decision noted the unfair possibility that staggering damage awards would work a hardship on an employer who had

[38] Monetary awards are not involved in the instant case. Judge Wisdom, however, noted that damage claims are likely. (Pet. App. 26a-27a). Other cases also indicate such claims are a foreseeable possibility. See *McAleer* v. *American Telephone & Telegraph Co.*, 416 F. Supp. 435 (D.D.C. 1976), *opinion withdrawn*, 13 EPD ¶ 11,624; and *Hupart* v. *Board of Higher Education*, *supra*, 420 F. Supp. at 1108.

[39] In the instant case above, the Steelworkers state that the program at issue has been negotiated into contracts affecting nearly one million employees in a major industry. (Steelworkers Cert. Pet. at 10).

acted in "good faith." (*Id.*, at n. 44). For the reasons stated throughout this brief, these conclusions also apply to employer potential reverse discrimination monetary liability.[40]

Numerous lower court decisions also support this conclusion. The Fifth Circuit has suggested that where discrimination is "government imposed" by the OFCCP, a back pay order would work a "substantial injustice" and should be carefully scrutinized by the district court. *See Stevenson* v. *International Paper Co.*, 516 F.2d 103, 113-114 (5th Cir. 1975).

Similarly, virtually all courts considering the issue have found back pay to be an inappropriate remedy where employers' good faith reliance upon a state protective statute ultimately was found to constitute unlawful Title VII discrimination.[41] These cases reveal several factors analogous to the affirmative action context. They consistently emphasize the "di-

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[40] Accord: Mirengoff, "*Weber* v. *Kaiser*, Impact and Alternatives" Equal Employment Practice Guide, Federal Bar Association, October, 1978, 220, 226.

[41] *See, e.g., Kober* v. *Westinghouse Electric Corp.*, 480 F.2d 240 (3d Cir. 1973); *Manning* v. *International Union*, 466 F.2d 812 (6th Cir. 1972), *cert. denied*, 410 U.S. 946 (1973); *Williams* v. *General Foods Corp.*, 492 F.2d 399 (7th Cir. 1974); *LeBlanc* v. *Southern Bell Telephone & Telegraph Co.*, 333 F. Supp. 692 (E.D. La. 1971), *aff'd*, 460 F.2d 1228 (5th Cir. 1972), *cert. denied*, 409 U.S. 990; *Tuma* v. *American Can Co.*, 373 F. Supp. 219 (D.N.J. 1974). *Accord, Stryker* v. *Register Publishing Co.*, 423 F. Supp. 476 (D. Conn. 1976), and cases cited therein at n. 2. See also fn. 35, *supra.*

Although this Court indicated it was not ruling on this issue, many of these cases were cited in *Albemarle Paper*, 422 U.S. at 423 n. 18.

lemma"[42] facing employers who did not have the benefit of a definitive judicial or even quasi-judicial determination as to the validity of their course of action.[43] They also point out that "[p]rior to a judicial determination, such as evidenced in this opinion an *employer can hardly be faulted* for following the explicit provisions of applicable state law." (Emphasis added).[44] The equitable relief from monetary damage liability requested here is *prospective* in application,[45] would be limited in nature,[46] and need not be extended to affirmative action plans adopted *after* this Court ultimately determines the extent to which race- or sex-conscious employment decisions are statutorily, constitutionally or otherwise permissible.

CONCLUSION

In recognition of the facts and arguments presented above, it is respectfully submitted that the administration of the federal antidiscrimination statutes and executive programs would benefit greatly if this Court were to adopt the standards suggested by

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[42] *See, e.g., Kober* v. *Westinghouse*, 480 F.2d at 249; and *Manning* v. *International Union*, 466 F.2d at 816.

[43] *Kober* v. *Westinghouse*, 480 F.2d at 249; and *Tuma* v. *American Can Co.*, 373 F. Supp. at 231.

[44] *Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219, 1227 (9th Cir. 1971); *Williams* v. *General Foods Corp.*, 492 F.2d at 408.

[45] *Burns* v. *Rohr Corp.*, 346 F. Supp. 994, 999 (S.D. Cal. 1972).

[46] *Schaeffer* v. *San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1007 (9th Cir. 1972).

the *Amicus*. Such guidance from this Court would do much to eliminate the present confusion surrounding employers' obligations to undertake affirmative action to remedy instances of underutilization of minorities and women.

Respectfully submitted,

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APPENDIX

July 20, 1977, policy clarification memorandum of Weldon Rougeau, the Director of the Office of Federal Contract Compliance Programs (OFCCP) of the United States Department of Labor, reported at Daily Labor Report No. 146, July 28, 1977, pp. A-10 through A-11 (BNA):

> We have analyzed the Supreme Court's opinion in *Teamsters* v. *United States* and have concluded that the opinion is not applicable to Executive Order 11246, as amended.
>
> The Executive Order program long has held that seniority systems which perpetuate the effects of past discrimination with respect to minority and female employees who had been hired and assigned to lower paying and less desirable jobs were a violation of the Executive Order. The Supreme Court's opinion states that such practices do not violate Title VII if they are pursuant to a *bona fide* seniority system. The linchpin of the Court's reasoning and holding is § 703(h)* of Title VII. The opinion expressly states, for example, that "were it not for § 703 (h), the seniority system in this case would seem to fall under the *Griggs* rationale."
>
> As you are aware, the Executive Order does not contain an exemption comparable to § 703(h), and our review of the Teamsters case is that it

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* [I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, privileges of employment pursuant to a bona fide seniority * * * system, * * * provided that such differences are not the result of an intention to discriminate because of race * * * or national origin * * *.

is a narrow decision based on the exemption. Accordingly, compliance officers conducting compliance reviews pursuant to the Executive Order shall continue to require adjustments in job or department seniority systems if they perpetuate the effects of past discrimination.